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No. 08-91

Supreme Court, U.S.
FILED
SEP 18 2008
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In The

Supreme Court of the United States

ELIZABETH STAUBER
and
J.M. and T.M.

Petitioners,

v.

JAMES MCGRATH,

Respondent.

On Petition For Writ Of Certiorari To The Fifth District Court Of Appeals Of Ohio

BRIEF FOR RESPONDENT JAMES MCGRATH IN OPPOSITION

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QUESTION PRESENTED

Whether an intermediate Ohio court contravened the Full Faith and Credit Clause by declining to enforce California child support orders, where California had improperly failed to honor an earlier Ohio paternity judgment and where the California judgments were obtained as part of a fraudulent litigation strategy in which Petitioners had failed to obey repeated Ohio orders to obtain genetic testing in order to further a separate personal injury action against Respondent.

PARTIES

Petitioners

Elizabeth Stauber (Formerly known as "Elizabeth Saret-Cook," "Elizabeth Cook," and "Elizabeth Saret")

T.J.M., minor child

J.S.M., minor child

Respondent

James McGrath

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BRIEF OF RESPONDENT IN OPPOSITION

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Ohio Fifth District Court of Appeals' decision in Court of Appeals Case No. 06 CA 71. *See* Pet. App. 3a. To the extent that review is sought in the consolidated Case No. 06 CA 72, *see* Pet. App. 1a-2a, jurisdiction is lacking as that case does not involve a constitutional or other federal issue.

STATEMENT

In early 1999, Petitioner Stauber (then known as Elizabeth Saret-Cook) and Respondent McGrath met in Ohio and developed a relationship, with Petitioner Stauber ultimately moving into Respondent's home. Unknown to Respondent, Petitioner Stauber was married at that time to Tommy M. Cook. *See* Petition for Dissolution of Marriage, Feb. 16, 2000, Los Angeles County Superior Court, No. BD317390 (indicating a marriage date of October 7, 1984). On March 29, 2000, Stauber gave birth to twin boys, Petitioners T.M. and J.M. Opp. App. 2. Not knowing that Stauber was married to another man at the time of conception, Respondent filed an Acknowledgement of Paternity in Ohio in June, 2000. *Id.*; Petition for Dissolution of Marriage, Feb. 16, 2000, Los Angeles County Superior Court, No. BD317390.

Stauber and McGrath soon parted ways, and in an effort to establish rights and obligations relating

to the twins, on March 6, 2001, they signed an Agreed Entry, that, *inter alia*, specifically required Stauber, McGrath and the twins to submit DNA samples in order to determine if McGrath was in fact the twins' father. Opp. App. 2. The Agreed Entry further stipulated that the Fairfield County, Ohio, Court of Common Pleas, Domestic Relations Division "has full personal, in rem and subject matter jurisdiction over all issues in this Entry and that said court shall be the exclusive court of jurisdiction for any future issues relating to the children unless both Plaintiff (Stauber) and Defendant (Respondent) consent to a change of jurisdiction in writing." Respondent timely submitted a DNA sample, but Stauber refused to submit samples for herself or the children, and moved to California with the twins. Opp. App. 2.

Given Stauber's failure to submit to testing, Respondent timely filed an action in June, 2001 to rescind his acknowledgement of paternity in the Fairfield County Court of Common Pleas, Domestic Relations Division. Pet. App. 4a. All of the parties to the instant action, including the minor children, J.M. and T.M., were before the Ohio trial court in that action to litigate the issue of paternity. In August, 2002, the trial court ordered Stauber to submit herself and the twins for genetic testing. When she did not do so, McGrath moved for summary judgment on October 15, 2002. Pet. App. 4a. On March 12, 2003, the trial court granted summary judgment and issued an order rescinding the acknowledgement of

paternity and concluding that James McGrath was not the biological father of the twins. Pet. App. 4a, 5a.

The trial court's order was reviewed by the Fifth District Court of Appeals of Ohio. In addressing the appeal, the Court noted that the appeal challenged the jurisdiction of the trial court to order genetic testing, alleging failure of service on Petitioner Stauber and her twins. Opp. App. 2, 5; *McGrath v. Saret* (Dec. 26, 2003) Fairfield App. No. 03CA26 (*McGrath I*); *see* Opp. App. 5. Citing the Agreed Entry's stipulation to jurisdiction, the Court of Appeals found that the trial court had personal and subject matter jurisdiction over the case. The Court of Appeals gave Stauber an additional opportunity to submit to testing, stating, "Now that we have found jurisdiction, appellant is to carry out the trial court's order of August 28, 2002 and submit herself and the twins for genetic testing within thirty days . . . " *McGrath v. Saret* (Dec. 26, 2003) Farifield App. No. 03CA26 (*McGrath I*); Opp. App. 2, 3.

Petitioner Stauber again failed to submit to genetic testing. Opp. App. 3. On March 31, 2004, the trial court granted summary judgment to McGrath, finding no parent-child relationship. *Id.* On appeal, the Fifth District observed that Stauber "essentially re-asserts her position that the service of process by publication on appellee's complaint was insufficient and that California is the proper forum for the parties' dispute." Opp. App. 5. Finding that the issue had been previously resolved, the Ohio Court of Appeals

affirmed the trial court's grant of summary judgment, and no further review was sought. Pet. App. 13a.

Meanwhile, in California, Petitioners had filed a personal injury lawsuit against James McGrath for alleged injuries to the twins in vitro, in Los Angeles County Superior Court, No. BC345601. In addition, while flatly ignoring the orders of the Ohio courts in the paternity proceeding to obtain genetic testing, Petitioner Stauber filed an additional paternity action in the Los Angeles County Superior Court, No. BF018828. On August 20, 2004, that court determined that it was bound by the Ohio grant of summary judgment, concluding that McGrath was not the father of the twins, and noting that the Ohio order, "must be and is afforded full faith and credit and res judicata effect in these proceedings." Opp. App. 7, 8.

Petitioners T.M. and J.M. filed a new paternity action in the same court, through guardian ad litem, Mikhael Cook, another son of Elizabeth Stauber. The case was assigned to a different judge, who refused to extend Full Faith and Credit to the Ohio finding of non-paternity, concluding that the children were not presented with adequate notice and opportunity to be heard in the Ohio proceeding and that their mother did not appropriately represent their interests. No. BF026800, August 12, 2005, Transcript at 26, Los Angeles Superior Court. Accordingly, one California trial court extended Full Faith and Credit to the Ohio finding of non-paternity, and another did not.

Petitioners then obtained several child support judgments against McGrath based upon both paternity actions, both without genetic testing. A support order arose in the first California paternity action, BF018828, because even though it ultimately found non-paternity, prior to rendering such a ruling, it had awarded judgments that were limited to interim amounts and arrearages. The court in the second California paternity action, BF026800, however, issued a prospective support order.

Petitioners returned to Ohio and filed the California judgments with the Ohio courts in both Fairfield County and adjoining Franklin County. In Fairfield County, the proceedings on the foreign judgments were consolidated in Fairfield County Court of Common Pleas, Domestic Relations Division, No. 05 DR 668. In addition, Petitioners filed a new paternity action in the Fairfield County Common Pleas, Domestic Relations Division, No. 06 PA 111.

The trial court granted summary judgment in favor of Respondent in the new paternity action, finding its earlier paternity decision in 2004 to be res judicata. Pet. App. 2a, 9a, 17a. With respect to enforcement of the California judgments, the court sustained McGrath's motion for relief from judgments pursuant to Ohio Civ. Rule 60(B) and refused to enforce the foreign judgments. Pet. App. 16a-19a.

The two decisions were appealed to the Fifth District Court of Appeals of Ohio in separate appeals, which were consolidated for decision. Pet. App. 1a.

Stauber finally revealed in both the trial court and the Court of Appeals briefing that her failure to produce the children for genetic testing was motivated by a belief that the insurance policy applicable in the personal injury action that petitioners were pursuing against McGrath would exclude coverage for acts against family members. Brief of Plaintiffs-Appellants Elizabeth Stauber, J.S.M. and T.J.M., Minor Children, Ohio Fifth District Court of Appeals No. 06 CA 71, at 8-9; Brief of Plaintiffs J. and T.M., Minor Children, Through Their Mother and Next Friend Elizabeth Stauber, Fairfield County Court of Common Pleas Case No. 06 PA 111, at 9, 10. Petitioners' brief explained:

> "[I]f McGrath were determined to be the father of [JSM], his health (sic) insurance would not pay for the enormous costs of [JSM]'s medical care. Rightly or wrongly, Stauber's failure to submit to DNA testing of her sons in Ohio litigation stemmed partly from her belief that she could help her sons more if paternity were *not* legally established. *Id.* at 9, 10.

In the paternity action, Ohio Court of Appeals No. 06 CA 72, Petitioners argued, as they had in the trial court, that application of res judicata was improper because the earlier Ohio decisions were "not on the merits" or did not involve the same parties. Brief of Plaintiff-Appellants Elizabeth Stauber, J.S.M. and T.J.M., minor children, Ohio Fifth District Court of Appeals, No. 06 CA 72 at 13-14; Brief of

Plaintiffs J. and T.M., Minor Children, Through Their Mother and Next Friend Elizabeth Stauber, In Support of Their Complaint to Establish Parentage Against James McGrath; Fairfield County Court of Common Pleas, Domestic Relations Div., No. 06 PA 111. No Full Faith and Credit argument was raised regarding the new paternity action, nor was it argued that the intervening California order made giving res judicata effect to the earlier Ohio order improper. The Court of Appeals rejected Petitioners' arguments. Pet. App. 7a-9a.

In the foreign judgment action, Court of Appeals No. 06 CA 71, Petitioners argued that the trial court had erred in failing to enforce the foreign judgments and that such failure violated Full Faith and Credit. The Court of Appeals observed that it had "already determined Ohio had jurisdiction over the children," and that the California court had failed to honor that determination. Pet. App. 12a. The Court concluded that the trial court had correctly concluded that the California judgment was "not enforceable in Ohio." Pet. App. 13a.

Petitioners sought review in the Ohio Supreme Court, which declined jurisdiction. Pet. App. 20a.

REASONS FOR DENYING THE WRIT

To be sure, the course of paternity and support proceedings between the parties to date is unsatisfying, with litigation rebounding from Ohio to California, and back, over a seven-year period. The unfortunate course of this case arises, however, not because of any recurring legal issue that requires resolution by this Court, but because Petitioner Elizabeth Stauber consciously defied repeated Ohio court orders to submit herself and her children to genetic testing that would have determined whether Respondent McGrath was in fact the father of the minor Petitioners in order to further her cause in a separate personal injury action against Respondent.

The serious issues of fraud and inequity that are raised by Stauber's conduct make the resulting California support judgments unworthy of Full Faith and Credit wholly apart from the "last in time" issue on which Petitioner seeks review. Moreover, deciding the Full Faith and Credit issue Petitioners present cannot clear up the interstate disagreement in this case in any event, as the portion of the decision below addressing Petitioner's recent Ohio paternity action did not involve that, or any other constitutional issue, and is therefore not subject to the Court's jurisdiction. Indeed, because Petitioners filed that new Ohio paternity action after having received support judgments based on California's finding of paternity, Ohio's renewed finding of non-paternity is now itself "last in time" on that issue, substantially rendering moot whether Ohio should have honored the California

support judgments. The limited analysis in the unpublished intermediate court decision below, along with Ms. Stauber's unreliable conduct as a litigant, are further problems with this case as a vehicle.

In any event, the issue on which petitioners seek review does not warrant this Court's attention. The situation involved is a narrow one, and the body of state court caselaw addressing the situation is aging and not well developed. In addition, the area of child support is one where uniformity and interstate coordination are the subject of ongoing interstate and national efforts through federal and uniform laws. The petition should be denied.

I. This Case is an Extremely Poor Vehicle For Addressing Any Full Faith and Credit Issue

A. The Case Involves Serious Issues of Fraud, Misconduct, and Estoppel that Warrant Declining to Enforce the California Judgments Under Any Understanding of the Full Faith and Credit Clause

Under the Full Faith and Credit Clause and implementing legislation, the credit that is due foreign judgments is limited to that which the judgments would receive "in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738, *accord New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614 (1947). The California

courts, like the Ohio courts, recognize that a judgment obtained by fraud or whose enforcement is otherwise inequitable warrants relief from judgment in appropriate circumstances. *See, e.g., Caldwell v. Taylor*, 218 Cal. 471, 475, 23 P.2d 758, 759 (1933) ("The jurisdiction of equity to afford appropriate relief from judgments generally . . . upon a showing of proper circumstances is well settled."); *In re Marriage of Modnick*, 33 Cal.3d 897, 905, 663 P.2d 187, 191 (1983) (relief from judgment is available for "almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing"); *Colley v. Bazell*, 64 Ohio St.2d 243, 248, 416 N.E.2d 605, 609 (1980) (relief from judgment seeks to "strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done"); *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102, 1104 (1996) (the rule granting relief from judgment is "a remedial rule to be liberally construed so that the ends of justice may be served"); *see also* Eugene F. Scoles and Peter Hay, Conflict of Laws § 24.17 (3d ed. 2000) (noting fraud, mistake, and equitable exceptions as rendering the full faith and credit due to the judgment of a sister state inapplicable). Such circumstances exist here.

The history of this litigation—indeed, of Mr. McGrath's entire relationship with petitioner Stauber—is one of concealment and fraudulent conduct. First, Stauber concealed from Respondent the fact that at the time the twins were conceived, she was actually married to another man. Respondent's initial Ohio

acknowledgment of paternity was made in ignorance of this critical information. Stauber also did not share this information with the Ohio courts during the litigation regarding rescission of McGrath's paternity acknowledgment, or with the California courts addressing paternity and support. *Cf. Caldwell*, 218 Cal. at 478-479 (concealment of true identity and marital status deemed fraud warranting relief from probate judgment).

Stauber's concealment did not stop there. Next, Stauber consciously defied repeated Ohio court orders to submit herself and her children to genetic testing in order to create a better insurance coverage argument in a California personal injury action seeking damages from McGrath for alleged injuries in vitro. In short, Petitioners sought to *avoid* a determination of paternity in order to escape application of a "family member" exclusion in McGrath's homeowner's policy in the California personal injury case. This strategy of manipulation succeeded, with Petitioners agreeing to a settlement of $320,000 in the personal injury action in October, 2007.

The intentional refusal to timely submit to paternity testing represented a deliberate effort to conceal information relevant to the insurance coverage at issue in the personal injury action. Moreover, this strategy of manipulation, which has come to light only in the present Ohio litigation, left McGrath disadvantaged in the California paternity and support litigation. Respondent was not aware of the reason for Petitioners' ongoing failure to submit to

testing, and thus was not able to raise arguments related to that refusal and to Petitioners' inconsistent litigation strategy. Nor, due to Stauber's concealment, was Respondent aware at that time that Stauber was married to another man during his relationship with her, a fact which certainly could have been relevant to the California court's willingness to determine McGrath's paternity without any genetic test results, treating him as "a presumed father." *See* Los Angeles County No. BF026800, August 12, 2005, Transcript at 21; *see also* Cal.Fam.Code § 7611 ("A man is presumed to be the natural father of a child if . . . (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated . . . "); *In re Nicholas H.*, 28 Cal.4th 56, 58, 46 P.3d 932, 933 (2002) (statute establishes a "rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence."). Moreover, by engaging in this multi-forum manipulation rather than simply submitting to the tests ordered by the Ohio courts, Petitioners subjected McGrath to more than $250,000 in attorney's fees, ensuring that he would have few resources left to pursue litigation by the time the full extent of Stauber's misconduct came to light.

Petitioners' deceptive litigation strategy deprived McGrath of a full and fair opportunity to defend himself in the California paternity and support litigation, and, as such, warrants relief from the

judgments obtained in those actions under both California and Ohio law. *See, e.g., Estate of Sanders*, 40 Cal. 3d 607, 614, 710 P.2d 232, 236 (1985) (allowing relief from judgment for fraud serves "the policy in favor of a fair adversary proceeding in which each party is provided an opportunity to fully present its case"). Moreover, having benefited in the personal injury action from *avoiding* a finding of paternity, principles of judicial estoppel prevent Petitioners from asserting and benefiting from the contrary position. It is "patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." *Jackson v. Los Angeles*, 60 Cal. App. 4th 171, 181 (1997); *see also Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 330, 879 N.E.2d 174, 183 (2007), *quoting Teledyne Industries, Inc. v. Natl. Labor Relations Bd.* 911 F.2d 1214, 1217 (C.A. 6 1990) ("Courts apply judicial estoppel in order to 'preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment' ").

When Petitioners filed the California judgments in Ohio, Respondent McGrath filed a motion under Ohio Civil Rule 60(b) for relief from the judgments. This procedure is in keeping with the Uniform Enforcement of Foreign Judgments Act, as codified in Ohio at Ohio Revised Code Section 2329.022, which provides that a foreign judgment filed for

enforcement in Ohio is subject to "the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of common pleas." McGrath argued not only that Full Faith and Credit should not be given to the California judgments due to their disregard of the earlier Ohio decisions, but also that Rule 60(b) relief was appropriate here on the basis of fraud and misconduct by Petitioner Elizabeth Stauber and to relieve McGrath from the inequitable and unjust operation of the California judgments in this case. Defendant's 60(b) Motion at 14-16, Fairfield County Court of Common Pleas, No. 05 DR 668. These arguments were also pressed on appeal. Brief of Defendant/Appellee, James S. McGrath at 18-19, Ohio Fifth District Court of Appeals, No. 06 CA 71.

Because these additional arguments constitute independent reasons for declining enforcement of the California judgments, Petitioners would not be entitled to enforcement of the California judgments even if this Court agreed with them on the question presented in their Petition. Indeed, consistent with constitutional avoidance principles, the Court should not decide the Full Faith and Credit issue presented when the decision below may be correct on other fact-intensive grounds that certainly raise no certworthy issue.

B. Resolution of the Question Presented Would Not Resolve the Interstate Concerns Petitioners Identify in this Case

At the completion of the second California paternity litigation, BF026800, two things occurred back in Ohio: (1) Petitioners filed several support judgments from the California litigation with the Ohio courts for enforcement; and (2) Petitioners filed a new paternity action in Ohio. As explained, *supra,* Petitioners' arguments in the trial and appellate courts in the Ohio paternity action, 06 PA 111/06 CA 72, did not invoke the Full Faith and Credit Clause in any fashion, instead simply challenging the application of Ohio res judicata law to the earlier Ohio judgments on the basis that the previous Ohio decision was not "on the merits" and did not involve all of the parties. As such, the Ohio Court of Appeals opinion as to the paternity appeal did not discuss, or even mention, the Full Faith and Credit Clause. Pet. App. 7a-9a. Petitioners apparently do not seek review of the decision of 06 CA 72 in this Court.[1]

The Ohio paternity action that was the focus of 06 CA 72 raised only state law issues and, thus, is not

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[1] Petitioners' arguments appear to focus on the enforcement of the foreign judgments, and the Petition Appendix did not include the trial court opinion in the paternity action as would be required by this Court's Rule 14(i) if review were sought of that decision. To the extent that Petitioners do intend to seek certiorari in the paternity action, there is no basis for this Court's jurisdiction.

at issue here. Therefore, the Ohio Court of Appeals decision in *that* matter now represents a final determination that Respondent McGrath is not the father of the minor Petitioners. Thus the emotional conundrum posed by the Petition—that California treats McGrath as the father but Ohio does not (Pet. at 2)—cannot be solved by review of the Ohio Court of Appeals decision regarding enforcement of the California support judgments. Indeed, because this unchallenged Ohio holding as to paternity now represents the "last in time" word on that issue, it should, under Petitioners' own theory, be respected in all jurisdictions.

C. The Issues Were Not Well-Developed Below

The analysis of the Full Faith and Credit Clause in the unpublished intermediate appellate opinion from which Petitioners seek review consists of the following: "The California judgment is simply not enforceable in Ohio." Pet. App. 13a. There is no discussion of the body of case law involving the treatment of inconsistent judgments under the Full Faith and Credit Clause. Indeed, the majority opinion does not cite a single decision of this Court for any point.

The limited analysis of the issue undertaken by the Court of Appeals' unpublished opinion reflects the focus of Petitioners' briefing at that stage. While arguing generally that Full Faith and Credit was

required for the California judgments, the primary thrust of Petitioners' arguments was that the California court was justified in failing to give Full Faith and Credit to the earlier Ohio judgments. Brief of Plaintiffs-Appellants Elizabeth Stauber, J.S.M. and T.J.M., Minor Children Ohio Fifth District Court of Appeals, No. 06 CA 71 at 13-27. Petitioners' briefing did not call the Court of Appeals' attention to any caselaw from this or any other court regarding the "three-step conflict-of-judgments problem" they now emphasize (Pet. at 7). The scant development of these points below presents a poor platform for this Court's consideration of the issues raised.

D. Several Other Factors Make this Case a Poor Vehicle

Petitioners are not merely seeking to have the Ohio courts enforce foreign judgments in contradiction to their own earlier decisions, they are doing so in a situation where orders of the Ohio courts were blatantly ignored by Petitioner Stauber in the earlier Ohio action. As such, this situation implicates special considerations regarding maintaining the integrity of the Ohio courts that would not be present in most cases involving inconsistent judgments. *Cf. Kubron v. Kubron*, 51 Cal. 2d 229, 331 P.2d 636 (1958) (California courts properly refused to enforce a Nevada judgment which was obtained in defiance of an earlier California temporary restraining order).

Moreover, the personal jurisdiction of the California court over Mr. McGrath in Case No. BF026800 was never resolved. Respondent filed a Motion to Quash Service of Summons for Lack of Personal Jurisdiction, but it was never ruled upon by the Court. As articulated in that Motion, McGrath was not, and had never been, a California resident, he owns no property in California, and he was not present in California during the time period during which the boys were conceived. Nor did he ever enter a general appearance in that proceeding. *See* Superior Court, County of Los Angeles, No. BF026800, August 12, 2005 Transcript at 39, 41 (noting McGrath had only made a special appearance). Moreover, McGrath's Agreed Entry with Stauber in Ohio had stipulated that the Fairfield County Court of Common Pleas in Ohio had exclusive jurisdiction for any future issues relating to the children. In these circumstances, whether the California courts properly had jurisdiction is highly questionable, and provides yet another basis for the Ohio courts to have declined Full Faith and Credit to the judgment in that case.

The California court's decision in No. BF026800 not to give Full Faith and Credit to the earlier Ohio judgments was clearly incorrect. The California court erred in determining that the Ohio courts had lacked jurisdiction over the minors when the Ohio courts had considered and decided the jurisdictional issue in the earlier litigation. *See*, *e.g.*, Opp. App. 8. Since the Ohio courts certainly had "jurisdiction to decide their jurisdiction," the Ohio decisions thereon should have

been determinative in the California proceeding. *See, e.g.,* Restatement (Second) of Judgments, § 96.

Finally, the Court should hesitate to attempt resolution of any important issue in a case in the hands of Petitioner Elizabeth Stauber. As explained, *supra,* Petitioner Stauber's conduct during the multiple layers of litigation regarding her children's paternity and support has been outrageous. Her conduct led the Ohio trial court in this action to deem her a vexatious litigant. *See* Pet. App. 2a. The California court stated that "Mother's actions thwarted Ohio's and Father's ability to properly apply Ohio law," deemed her behavior "extremely troubling," and questioned whether she was motivated by "vitriol or stupidity." Los Angeles County Superior Court, No. BF026800, August 12, 2005 Transcript at 20-21.

Stauber has engaged in similarly outrageous conduct in prior litigation. One such abuse was described by the California Court of Appeals as follows:

> This case concerns the nightmarish aftermath of a failed office romance between Saret-Cook and the individual respondent, a real-life tragedy similar to the movie "Fatal Attraction." The evidence shows a relentless campaign of harassment by Saret-Cook against the individual respondent, tenaciously pursued with brutal effect. Both personal suffering and professional disaster resulted.

Saret-Cook v. Gilbert, Kelly, Crowley & Jennett, 74 Cal.App.4th 1211, 1216 (Cal.App. 2 Dist., 1999). Stauber has now repeated here her practice of brutalizing a man—with whom she had a past romantic relationship—by way of relentless litigation.

II. Even if this Case Were an Appropriate Vehicle, Petitioners' Question Presented Is Not Certworthy

As the Petition recognizes (Pet. 7), "the three-step conflict-of-judgments problem posed to the Ohio appellate court is nothing new, and outside of the subset of cases where the first and third forum are the same, there is general agreement nationwide that the second-in-time judgment is due full faith and credit in the third forum." Petitioners claim that differing approaches among some state courts as to the proper outcome when the first and third fora are the same warrant this Court's attention. The body of law they identify, however, is aging, is not well developed, is implicated infrequently, and is of lessening significance in light of federal enactments and uniform laws applicable to interstate family law issues. Petitioners certainly do not demonstrate any "compelling reason" for this Court's review. Sup. Ct. Rule 10.

First, Petitioners acknowledge that the decision of the Ohio Court of Appeals is not inconsistent with any decision of this Court. While suggesting that the Ohio Court of Appeals decision "rest[s] uneasily in the

shadow" of certain "statements" in *Morris v. Jones*, 329 U.S. 545 (1947) and *Sutton v. Leib*, 342 U.S. 402 (1952), (Pet. at 10), the Petition itself acknowledges (Pet. at 11) that neither of those cases is directly applicable here. That is exactly correct. In *Morris*, this Court required Illinois to enforce a Missouri judgment in conflict with an earlier Illinois decree where that Illinois decree was never raised in the Missouri courts. That is quite different from the situation here, where the earlier Ohio decisions were brought to the attention of the California courts, but not given Full Faith and Credit in the California paternity action. *Sutton* is even further from the point, as it did not involve any attempt to enforce an out-of-state judgment in conflict with an earlier decision of the forum state. Further, as Petitioner recognizes, any discussion regarding that situation was dictum.

The Petition similarly fails to demonstrate any split of authority among state courts that warrants this Court's attention. Although attempting to portray the Ohio Court of Appeals decision here as departing from the usual and proper rule, the Petition does not bother to identify even one state court case that has actually adopted the position *contrary* to that taken by the Ohio Court of Appeals, enforcing a foreign judgment which conflicts with an earlier judgment of the forum, and which was called to the foreign court's attention. This omission appears to be for good reason. Respondent is aware of very few state courts even addressing the issue in the

thirty-nine years since Justice Ginsburg's article on the topic. *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 800 (1969).

Two intermediate state courts in the 1980's did render decisions that might be viewed as inconsistent with that reached below. *See Marriage of Hanley*, 199 Cal. App. 3d 1109 (1988); *Sullivan v. Sullivan*, 98 Ill. App. 3d 928, 424 N.E.2d 957 (1981). However, other intermediate courts in these same states have rendered decisions which the Petition cites as *consistent* with that taken by Ohio below. *See* Pet. at 8, citing *Stuart v. Lilves*, 210 Cal. App. 3d 1215 (1989) and *Klumpner v. Klumpner*, 182 Ill. App. 3d 22, 537 N.E.2d 914 (1989). Wherever these cases leave the law within those two states, any intrastate uncertainties among intermediate appellate courts do not require this Court's involvement.

Respondent is aware of only one State Supreme Court that has arguably taken the position Petitioners desire in the thirty-nine years since the Ginsburg article. In *Campion v. Dept. of Community & Regional Affairs*, 876 P.2d 1096 (Alaska 1994), the district court for the Virgin Islands had concluded that an earlier Alaska default judgment was invalid for improper service of process. When enforcement of the original Alaska default judgment was subsequently sought in the Alaska courts, the Alaska Supreme Court concluded that the intervening Virgin Islands

decision collaterally estopped it from considering the appropriateness of service in the original action.

The Court rejected the proposition that "neither collateral estoppel nor the full faith and credit clause . . . require that the forum state's courts must give effect to a sister state judgment holding that a prior judgment of the forum state is void." *Campion*, 876 P.2d at 1100. The creditor had cited one of the cases identified and criticized by the Ginsburg article, *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019 (1962), for this proposition, but the Alaska Supreme Court did not necessarily attribute the rejected view to *Colby*, only calling that case unpersuasive "to the extent" it could be read to support that position. Moreover, the Court did *not* reject the principle, attributed by the Court to *Jensen v. Barnes*, 33 Colo. App. 333, 519 P.2d 1223 (1974) and *Stuart v. Lilves*, 210 Cal. App. 3d 1215 (1989) (two cases identified by the present Petition as consistent with the decision below (Pet. at 8)), that "when the courts of two states have reached conflicting decisions on the same issue and one of the conflicting decisions was rendered by a court of the state in which the current action is pending, that decision is controlling." *Campion*, 876 P.2d at 1099. Instead, the Alaska Court simply reasoned that because the original case involved a default judgment, none of the issues was "actually litigated," so that there were not, as in those cases, conflicting in-state and out-of-state judgments on the same issue. *Id.*

As to cases agreeing with the decision below, the body of caselaw is also limited. The Petition observes (Pet. at 8) that Justice Ginsburg's article noted four state decisions that, as of 1969, appeared to endorse an exception to the last-in-time rule when the first-in-time decision issued from a court in their state. The petition cites five additional state appellate decisions as subsequently adopting this view (Pet. at 8), including the intermediate California and Illinois decisions already mentioned as in tension with other decisions in those states. The most recent of the five cited decisions was fourteen years ago, and that case is the only one of the five that arose from a state court of last resort. *See Medveskas v. Karparis*, 161 Vt. 387, 395, 640 A.2d 543, 547 (1994).

In sum, given the relatively small number of cases meaningfully addressing the issue, particularly in state supreme courts, and particularly in recent years, this is hardly a body of law that reveals any important and current conflict requiring resolution by this Court. This is all the more true in light of the intervening guidance this Court has provided regarding the Full Faith and Credit Clause as it applies to judgments—guidance that the cited decisions did not have the opportunity to consider. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222 (1998); *Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367 (1996).

The decision below certainly adds nothing to this mix. Although Respondent believes the result was well founded, as an unpublished opinion of an intermediate Ohio court, the decision cannot be taken as

meaningfully representing the considered position of the Ohio courts. Indeed, in unsuccessfully attempting to persuade the Ohio Supreme Court to hear the case, the Petitioners urged that "Ohio courts themselves are not in accord" on the issue presented. Ohio Supreme Court No. 2008-0025, Memorandum of Appellants J.M. and T.M. in Support of Jurisdiction at 3. In fact, Petitioners argued that while the decision below declined to give effect to the California judgments, an Ohio trial court in a neighboring county did give the very same judgments effect. *Id.* at 3, 8 (citing *Saret-Cook v. McGrath*, Franklin County Common Pleas Nos. 06-JG-02-2171). Petitioners' briefing to the Ohio Supreme Court also pointed to a decision of another District of the Ohio Court of Appeals as conflicting with the result reached by the Court of Appeals below. *Id.* at 8, citing *Winkler v. Stowe* (Ohio App. Jan. 21, 1997), 4th Dist. No. 95 CA 763, 1997 WL 30947, at *1. In light of what Petitioners themselves have deemed a lack of accord within the Ohio courts, the unpublished decision here cannot be viewed as adding anything to a claimed split of authority.

Finally, any need for review is further diminished given the variety of uniform and federal laws that have been implemented to address family law issues that have sometimes generated interstate dilemmas in the past. The Uniform Interstate Family Support Act ("UIFSA") was implemented in all 50 states in the late 1990's to address the difficulties of interstate enforcement and modification of child support orders. UIFSA was paralleled by federal enactment of the

Full Faith and Credit to Child Support Orders Act, 28 U.S.C. § 1738B, which established national standards under which courts of various states were to determine their jurisdiction to issue child-support orders and the effect to be given by each state to child-support orders issued by the courts of other states. Other uniform and federal laws have been implemented to govern other family law issues which have generated interstate issues. *See, e.g.,* Uniform Child Custody Jurisdiction and Enforcement Act (limiting child custody jurisdiction to one state and providing enforcement provisions for child custody laws); Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A; Uniform Parentage Act (regularizing law for determining parentage).

Adoption of these federal and uniform family law measures in recent decades allows many questions regarding the respect to be given to out-of-state judgments to be resolved as a matter of statute. The UIFSA, for example, contains provisions regarding which of several conflicting support orders is controlling. The ongoing role of uniform and federal acts in resolving interstate difficulties in these areas reduces the need for this Court to do so as a matter of constitutional law.

The application of UIFSA and the Federal Full Faith and Credit to Child Support Orders Act to this case and their relevance to the issues raised has not been addressed in this litigation and was not considered by the Ohio Court of Appeals. Given the important role these federal and uniform Acts play in this

area, this Court should hesitate to accept review in a case where their relevance has not been examined. Moreover, to the extent that nonenforcement of out-of-state orders becomes a significant phenomenon—of which there is no present evidence—the issue may be best addressed through the continued efforts of the states themselves.

CONCLUSION

For the forgoing reasons, Respondent, James McGrath, respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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Not Reported in N.E.2d, 2005 WL 121713

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Fairfield County.

James S. MCGRATH Plaintiff-Appellee

v.

Elizabeth L. SARET, et al. Defendants-Appellants

No. 04 CA 27.

Jan. 13, 2005.

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 01 PA 94, Affirmed.

John M. Snider, Stebelton, Aranda & Snider, LPA, Lancaster, Ohio, for Plaintiff-Appellee.

Thomas M. Tyack, Tyack, Blackmore & Liston, Columbus, Ohio, for Defendant-Appellants.

Hon. WILLIAM B. HOFFMAN, P. J., Hon. SHEILA G. FARMER, J. and Hon. JOHN W. WISE, J.

OPINION

WISE, J.

{¶ 1} Appellant Elizabeth Saret appeals the grant of summary judgment in favor of Appellee James S. McGrath in the Fairfield County Court of Common Pleas, Domestic Relations Division. The relevant facts leading to this appeal are as follows.

{¶ 2} On March 29, 2000, Appellant Elizabeth Saret gave birth to twin sons. On June 26, 2000, appellant, together with Appellee James McGrath, executed an acknowledgement of paternity form, naming appellee as the father of the twins.

{¶ 3} On March 6, 2001, the parties agreed to genetic testing to establish the paternity of the twins. Said agreement acknowledged that appellant and the twins would be moving to California. Appellant did not submit herself or the twins for the agreed upon genetic testing.

{¶ 4} On June 25, 2001, appellee filed a complaint in Fairfield County for rescission of the acknowledgement of paternity. On August 27, 2002, the trial court ordered appellant to submit herself to genetic testing within thirty days or an order would be issued stating appellee was not the father of the twins. A nunc pro tunc entry was filed on August 28, 2002 to include the twins for genetic testing.

{¶ 5} Because appellant did not submit herself and the twins for genetic testing per the August 28, 2002 order, appellee filed a motion for summary judgment on October 15, 2002. By judgment entry filed March 12, 2003, the trial court issued an order stating appellee was not the biological father of the twins.

{¶ 6} Appellant thereupon appealed to this Court. We found without merit appellant's claim that Fairfield County lacked jurisdiction, but remanded the matter to provide appellant one more opportunity

to submit to genetic paternity testing. *See McGrath v. Saret* (Dec. 26, 2003), Fairfield App. No. 03CA26 (*"McGrath I"*).

{¶ 7} Following remand, appellant did not avail herself of genetic testing, nor did she appeal our decision to the Ohio Supreme Court. Appellee filed a motion for summary judgment with the trial court on February 5, 2004. Appellant filed a memorandum contra on March 16, 2004. On March 31, 2004, the court issued a judgment entry granting summary judgment in favor of appellee, and recognizing the paternity acknowledgements of June 26, 2000 as being timely rescinded. The court thus ordered that no parent and child relationship exists between appellee and the twins, T.J. and J.S.

{¶ 8} Appellant filed a notice of appeal on April 29, 2004. She herein raises the following sole Assignment of Error:

{¶ 9} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THE WITHIN CASE."

{¶ 10} In her sole Assignment of Error, appellant contends the trial court erred in granting summary judgment in favor of appellee regarding his complaint for rescission of paternity. We disagree.

{¶ 11} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court.

{¶ 12} *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * " A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶ 13} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement,

the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶ 14} Appellant herein essentially re-asserts her position that the service of process by publication on appellee's complaint was insufficient and that California is the proper forum for the parties' dispute. However, this Court's decision of December 26, 2003, states as follows in pertinent part: "From the inception of this case, appellant challenged the trial court's jurisdiction to hear appellee's complaint. * * * Now that we have found jurisdiction, appellant is to carry out the trial court's order of August 28, 2002 and submit herself and the twins for genetic testing within thirty days of this opinion and accompanying judgment entry. If appellant fails to comply, the trial court may reissue its March 12, 2003 judgment entry." *McGrath I* at 6.

{¶ 15} Following remand, appellee filed a motion for summary judgment on February 5, 2004, attaching therewith an affidavit by a LabCorp supervisor, indicating that appellant and the two children had not submitted samples for genetic testing. Appellant does not herein challenge the veracity of the affidavit. Moreover, the doctrine of the law of the case "establishes that the 'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Pipe*

Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc., 81 Ohio St.3d 214, 218, 690 N.E.2d 515, 1998-Ohio-465, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. The doctrine of the law of the case "functions to compel trial courts to follow the mandates of reviewing courts." *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781, quoting *Nolan*, supra.

{¶ 16} Accordingly, we find no genuine issue of material fact as to appellant's failure to submit to genetic testing with the twins, and we hold the trial court did not err in granting summary judgment based on the law of the case.

{¶ 17} Appellant's sole Assignment of Error is overruled.

{¶ 18} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Fairfield County, Ohio, is affirmed.

HOFFMAN, P. J., and FARMER, J., concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Fairfield County, Ohio, is affirmed.

Costs to appellant.

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ELIZABETH SARET-COOK, Petitioner, v. JAMES SCOTT MCGRATH, Respondent.	Case No. BF018828 ~~{PROPOSED}~~ **ORDER AFTER HEARING** (Filed Aug. 20, 2004) Date: June 21, 2004 Time: 8:30 a.m. Dept: 84 Commissioner James D. Endman

Petitioner's Motion to Dismiss this proceeding came on regularly for hearing on June 21, 2004, at 8:30 a.m., in Department 84, the Honorable James D. Endman, Judge *Pro Tem*, presiding. Appearing on behalf of Petitioner and responding party was Lionel P. Levin of Levin & Margolin. Appearing on behalf of

Respondent and moving party was Deana M. White of Morrison & Foerster LLP.

The Court, after considering the pleadings and argument of counsel, ruled as follows:

1. The Judgment Entry of the Ohio Court of Common Pleas entered March 31, 2004 holding that McGrath is not the father of Saret-Cook's twin boys, J. and T.M., must be and is afforded full faith and credit and res judicata effect in these proceedings;

2. The Judgment Entry of the Ohio Court of Common Pleas entered March 31, 2004 holding that the Acknowledgements of Paternity were timely rescinded by McGrath must be afforded full faith and credit and res judicata effect in these proceedings;

3. The Ohio Court of Appeals December 23, 2003 determination that the Ohio courts have full subject matter and personal jurisdiction over the parties and the issue of paternity must be afforded full faith and credit and res judicata effect in these proceedings;

4. The orders for temporary support in this action are terminated as of the filing date of the instant motion, April 21, 2004; and

5. The Court retains jurisdiction solely over the issue of enforcement of its interim orders for support, as all other issues were resolved by the Ohio courts.

Dated: ~~July 27, 2004~~ ~~MORRISON & FOERSTER LLP~~

AUG 20 2004 ~~By: /s/ Deana M. White~~
~~Deana M. White~~
~~Attorneys for Respondent~~
~~JAMES MCGRATH~~

/s/ James Endman
JAMES D. ENDMAN
JUDGE PRO TEM